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**FEDERAL ELECTION COMMISSION**

999 E Street, N.W.  
Washington, D.C. 20463

**CELA**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6275

DATE COMPLAINT FILED: April 20, 2010

DATE OF NOTIFICATION: April 23, 2010

RESPONSE RECEIVED: June 11, 2010

DATE OF ACTIVATION: June 29, 2010

STATUTE OF LIMITATIONS: March 3, 2015 –  
March 4, 2015

**COMPLAINANT:**

Kenneth F. Boehm, National Legal and Policy  
Center

**RESPONDENTS:**

Massa for Congress and Beverly Massa, in her  
official capacity as treasurer  
Eric JJ Massa  
Joseph Angelo Racalto

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 434(b)  
2 U.S.C. § 439a(b)  
11 C.F.R. § 100.52(d)(2)  
11 C.F.R. § 104.11(b)  
11 C.F.R. § 113.1(g)(1)(ii)(D)

**INTERNAL REPORTS CHECKED:** Disclosure Reports

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

This matter involves allegations that former Congressman Eric Massa, his campaign committee, Massa for Congress ("the Committee"), and Joseph Racalto, Massa's Congressional Chief of Staff, violated the Federal Election Campaign Act of 1971, as amended ("the Act") in connection with two payments made by the Committee days before Massa's resignation from Congress in March 2010. The complaint alleges that a \$40,000 payment by the Committee to Joseph Racalto for a "campaign management fee" one day before Massa announced his

1 resignation may have violated the Act's personal use prohibition because Rocalto may not have  
2 performed campaign work. *See* 2 U.S.C. § 439a(b)(1). According to information in the  
3 complaint, Rocalto stated that he agreed to defer payment for fifteen months until he learned that  
4 Massa would not stay in office; in which case, the complaint contends that the Committee should  
5 have reported the agreement as a debt or obligation on its disclosure reports. *See* 2 U.S.C.  
6 § 434(b). The complaint also alleges that a \$31,896.42 payment to GMAC for lease of a  
7 campaign vehicle two days before Massa announced his resignation may have constituted a  
8 prohibited use of campaign funds for personal use. *See* 2 U.S.C. § 439a(b)(1).

9 A joint response from the Committee and Massa ("Massa Response") asserts that the  
10 complaint has not alleged a specific violation of the Act, but nevertheless responds that the  
11 \$40,000 payment for Rocalto's work was not authorized by Massa and was not an appropriate  
12 payment for Rocalto's work for the campaign. The Massa Response explains that the Committee  
13 believes that some amount of compensation is appropriate, but that it has asked Rocalto to return  
14 the payment in order for the Committee and Rocalto to agree on an appropriate amount. A  
15 separate response from Joseph Rocalto ("Rocalto Response") states that Rocalto received the  
16 \$40,000 payment as compensation for campaign work from November 2008 through  
17 March 2010.

18 The Massa Response also asserts that after the Committee purchased the vehicle, Eric  
19 Massa and his wife, Beverly Massa, purchased the vehicle from the Committee for fair market  
20 value. The response explains that the Committee's disclosure reports incorrectly referred to the  
21 car payments as lease payments, and further states that all car payments were in fact in  
22 connection with a purchase agreement. Massa Response at 2 and Beverly Massa Decl. at ¶ 3.

1 Based on the available information, we recommend that the Commission: (1) find reason  
2 to believe that Massa for Congress and Beverly Massa, in her official capacity as treasurer,  
3 violated 2 U.S.C. § 434(b) by failing to report debts and obligations in connection with the  
4 \$40,000 payment to Joseph Racalto; (2) take no action at this time as to with respect to the  
5 allegation that Massa for Congress and Beverly Massa, in her official capacity as treasurer, and  
6 Eric Massa violated 2 U.S.C. § 439a(b) in connection with the \$40,000 payment to Joseph  
7 Racalto; (3) find reason to believe that Massa for Congress and Beverly Massa, in her official  
8 capacity as treasurer, and Eric Massa violated 2 U.S.C. § 439a(b) in connection with the  
9 \$31,896.42 payment to GMAC; and (4) take no action at this time with respect to Joseph  
10 Racalto. The proposed investigation would seek to obtain information regarding the possible  
11 deferred compensation arrangement in connection with the \$40,000 payment to Racalto.  
12 Further, we would seek to obtain information about the vehicle and purchase agreement in order  
13 to determine whether Massa paid fair market value to purchase the vehicle from the Committee.

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 **A. Racalto Disbursement**

16 The Committee's 2010 April Quarterly Report includes a \$40,000 payment to Joseph  
17 Racalto, Massa's Congressional Chief of Staff, on March 4, 2010 for "campaign management  
18 fee." Relying on statements in press articles, the complaint argues that Racalto did not perform  
19 significant campaign work. Complaint at 3. A press article attached to the complaint reported  
20 that four current and former Massa campaign staffers said that that they were surprised by the  
21 payment and were unaware that Racalto was performing any substantial campaign work. See  
22 Carol D. Leonnig, "Massa Gave \$40,000 to Aide Before Resigning as Congressman,"  
23 *Washington Post*, April 17, 2010 (Complaint Exhibit B) ("Leonnig, April 17, 2010"). The

1 complaint also points to statements by Camilla McKinney, identified in press articles as  
2 Racalto's attorney, that the payment was part of a deferred compensation arrangement.  
3 Complaint at 2-3 and Leonnig, April 17, 2010. If a deferred compensation arrangement existed,  
4 the complaint contends that the Committee should have reported the agreement as a debt or  
5 obligation on its disclosure reports. Complaint at 3. Finally, the complaint questions the  
6 legitimacy of the payment because press accounts reported that Racalto filed a complaint against  
7 Massa on March 23, 2010 alleging sexual harassment. *Id.* In April 2010, several press articles,  
8 including those cited in and attached to the complaint, reported that Racalto was a central figure  
9 in allegations that Massa sexually harassed his aides, and questioned the timing of the payment,  
10 given Massa's resignation announcement and the fact that Racalto had filed a sexual harassment  
11 complaint against Massa with the House of Representatives Ethics Committee. *See* Leonnig,  
12 April 17, 2010; Stephanie Condon, "Rep. Eric Massa Resigns, Takes Responsibility for  
13 Harassment Charges," CBS News Political Hotsheet, March 5, 2010, available at  
14 [http://www.cbsnews.com/8301-503544\\_162-6270838-503544.html](http://www.cbsnews.com/8301-503544_162-6270838-503544.html).

15 There are significant unresolved factual issues about the circumstances surrounding the  
16 \$40,000 payment. The Massa Response states that political committees may permissibly use  
17 excess campaign funds to employ staff or consultants and asserts that the complaint has not  
18 alleged a specific violation of the Act. Massa Response at 3-4. However, the Massa Response  
19 does not assert that the \$40,000 payment to Racalto was appropriate and in fact suggests the  
20 opposite:

21 The Committee acknowledges that Mr. Racalto was entitled to some amount of payment  
22 for services to the campaign. The Committee has publicly stated that the amount of the  
23 \$40,000 was not "authorized" by Mr. Massa and has demanded that Mr. Racalto return

1 the funds and that the committee and Mr. Rcalto mutually agree on an appropriate  
2 amount of compensation for his work for the campaign.<sup>1</sup>  
3

4 Massa Response at 4. Eric Massa's sworn declaration in the response is silent on the issue of the  
5 payment to Rcalto.

6 The Rcalto Response states that Rcalto received the \$40,000 payment as compensation  
7 for campaign work, and attaches eighteen emails about campaign events, meetings, and strategy  
8 as evidence that Rcalto performed campaign work from November 2008 through March 2010.  
9 Rcalto Response at 2 and Exhibit A. The Rcalto Response includes a purported copy of an  
10 email from the Committee's Assistant Treasurer and Compliance Officer stating that the \$40,000  
11 payment to Rcalto was compensation for campaign work. Rcalto Response Exhibit B.

12 A press article attached to the complaint included statements by Milo Silberstein, who is  
13 identified as Massa's attorney, that there was never a contract between Rcalto and the  
14 Committee and that the \$40,000 amount was determined solely by Rcalto. See Carol D.  
15 Leonnig, "Massa Alleges Fraud in Campaign Payment, Salary Increase" *Washington Post*,  
16 April 18, 2010 (Complaint Exhibit C). Another press article attached to the complaint reported  
17 that Rcalto's attorney stated that the \$40,000 amount was determined under contract, which  
18 established quarterly amounts that Rcalto would be paid, but stated that she could not provide a  
19 copy of the contract or the date the contract was signed. See Leonnig, April 17, 2010. The  
20 Rcalto Response did not attach or mention any employment contract. Finally, the Rcalto  
21 Response argues that Rcalto had no responsibility for disclosing a deferred compensation  
22 agreement with the Committee or for filing the Committee's disclosure reports. Rcalto  
23 Response at 2.

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<sup>1</sup> It is unclear why the Massa Response is framed in terms of the Committee's public statement.

1 The Committee's disclosure reports suggest that the \$40,000 payment to Racalto fell  
2 outside of the Committee's usual pattern of compensation for campaign work. The Committee's  
3 disclosure reports include frequent disbursements to individuals for "payroll" or "consulting  
4 fee," but the disbursements are smaller, ranging between approximately \$1,000 to \$7,000, and  
5 are made on a periodic basis, either monthly or quarterly, rather than in a lump sum. In addition,  
6 several of the Committee's disclosure reports covering the time period when Racalto was  
7 purportedly performing campaign work disclose debts and obligations to individuals and firms  
8 for legal and consulting services, but none to Racalto. Although Racalto may have been  
9 performing campaign work from November 2008 through March 2010, his compensation was  
10 not disclosed until the Committee made the \$40,000 payment on March 4, 2010.

11 The available information suggests that Racalto completed work for the campaign from  
12 November 2008 through March 2010 but was not paid until March 2010. Therefore, the  
13 Committee may have failed to disclose a deferred compensation agreement with Joseph Racalto  
14 in violation of the Act. Political committees are required to report the amount and nature of  
15 outstanding debts and obligations owed. 2 U.S.C. § 434(b)(8). Commission regulations specify  
16 that a debt or obligation, including a loan, written contract, written promise or written agreement  
17 to make an expenditure over \$500 must be reported as of the date the obligation is incurred, or in  
18 the case of salary or any other regularly reoccurring administrative expense, as of the date the  
19 payment is due. 11 C.F.R. § 104.11(b). See MUR 5218 (Russ Francis for Congress)  
20 (Commission found reason to believe the committee violated 2 U.S.C. § 434(b) where unpaid  
21 staff salary under an employment contract was not reported as debt). Accordingly, the  
22 Committee would be required to disclose any obligation owed to Racalto as part of a deferred  
23 compensation agreement.

1           Accordingly, we recommend that the Commission find reason to believe that Massa for  
2 Congress and Beverly Massa, in her official capacity as treasurer, violated 2 U.S.C. § 434(b).  
3 Because there are significant factual questions regarding the nature of the compensation  
4 arrangement between the Committee and Rcalto, a targeted investigation will be necessary to  
5 determine the Committee's reporting obligations.

6           As for the complaint's allegation that the Committee's \$40,000 payment to Rcalto  
7 constituted impermissible personal use of campaign funds, the Act grants committees wide  
8 discretion to use excess campaign funds, including employing staff and paying incidental  
9 expenses. *See* 2 U.S.C. § 439a(a), MUR 5701 (Filner) (Commission found no personal use  
10 violation where committee funds were used to pay a consultant fair market value for *bona fide*  
11 services), Advisory Opinion 1993-6 (Citizens for Congressman Panetta) and Advisory Opinion  
12 1978-43 (Congresswoman Barbara Jordan). The Act, however, prohibits the use of campaign  
13 contributions for unlawful purposes or for personal use. *See* 2 U.S.C. § 439a. Should the  
14 investigation into the circumstances of the payment uncover evidence that the payment was  
15 made for any unlawful purpose or for personal use, including in connection with Rcalto's  
16 sexual harassment complaint against Massa, we would recommend that the Commission make  
17 the appropriate reason to believe findings at that time. Therefore, we recommend that the  
18 Commission take no action at this time as to with respect to the allegation that Massa for  
19 Congress and Beverly Massa, in her official capacity as treasurer, and Eric Massa violated  
20 2 U.S.C. § 439a(b) in connection with the \$40,000 payment to Joseph Rcalto. We also  
21 recommend that the Commission take no action at this time with respect to Joseph Rcalto. At  
22 the conclusion of the investigation, we will make appropriate recommendations with respect to  
23 this individual.

**B. Vehicle Disbursement**

The Committee's 2010 April Quarterly disclosure report includes a \$31,896.42 payment to GMAC on March 3, 2010 for "campaign car lease." The complaint argues that because the Committee's five previous monthly payments for the vehicle had been far lower (\$605.68) and the Committee had no foreseeable campaign-related use for the vehicle due to Massa's resignation announcement on March 5, 2010, the payment may have been personal use of campaign funds. Complaint at 5.

The Massa Response explains that the Committee purchased the vehicle for campaign use in September 2009 and made regular payments of \$605.68 in accordance with a finance agreement. Massa Response at 2 and Beverly Massa Sworn Declaration ("Decl.") at ¶ 3. The Committee's 2009 October Quarterly Report shows that the Committee made a \$10,000 payment to Mike Barnard Chevrolet on September 7, 2009 for "down payment campaign vehicle." The Committee's disclosure reports indicate that the Committee made payments of \$605.68 on each of the following dates: October 27, November 25, and December 28, 2009 and January 25 and February 25, 2010. According to the Committee, immediately after Massa's decision not to seek reelection, the Committee determined that it would be in its best financial interest to purchase the vehicle outright to avoid paying additional interest. Massa Response at 2 and Beverly Massa Decl. at ¶ 4. The Committee purchased the vehicle on March 3, 2010 for \$31,896.42 and then, on April 27, 2010, Eric and Beverly Massa purchased the vehicle for \$22,025.00 as indicated on the Committee's 2010 July Quarterly Report. According to Eric Massa, the \$22,025.00 amount was fair market value as determined by the Kelley Blue Book.<sup>2</sup> Massa Response at 2; Eric Massa Decl. at ¶ 3; Beverly Massa Decl. at ¶ 6. The Massa Response also states that prior to

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<sup>2</sup> The Massa Response did not include the fact that the Committee made a down payment for the vehicle or specify the amount Eric and Beverly Massa paid to purchase the vehicle from the Committee.



1 Eric and Beverly Massa's purchase of the vehicle it was used exclusively for campaign purposes  
2 and not used for personal use. *See* Massa Response at 3; Eric Massa Decl. at ¶ 2; Beverly Massa  
3 Decl. at ¶ 5.

4 The Act allows contributions accepted by a candidate and any other donations received  
5 by an individual as support for activities of the individual as a holder of Federal office to be used  
6 by the candidate or individual with wide discretion, including: for otherwise authorized  
7 expenditures in connection with the campaign for Federal office of the candidate or individual;  
8 for ordinary and necessary expenses incurred in connection with duties of the individual as a  
9 holder of Federal office; and for any other lawful purpose unless prohibited by the Act. *See*  
10 2 U.S.C. § 439a(a). The Act prohibits the conversion of any contribution or donation to personal  
11 use. *See* 2 U.S.C. § 439a(b). Conversion to personal use is defined as using a contribution "to  
12 fulfill any existing commitment, obligation, or expense of a person that would exist irrespective  
13 of the candidate's election campaign or individuals' duties as a holder of Federal office." *See*  
14 2 U.S.C. § 439a(b)(2).

15 The Act and Commission regulations specifically prohibit the use of contributions for  
16 noncampaign-related vehicle expenses, unless they are a *de minimis* amount. *See* 2 U.S.C.  
17 § 439a(b)(2)(C); 11 C.F.R. § 113.1(g)(1)(ii)(D). The Commission has considered whether the  
18 sale of a committee's campaign assets, such as a vehicle, would result in a contribution to a  
19 committee. In Advisory Opinion 1985-1 (Ratchford), the Commission stated that the principal  
20 campaign committee with valuable supplies that wished to terminate its operations would be  
21 permitted to liquidate such assets for debt retirement purposes, or in contemplation of prompt  
22 dissolution of the committee, without a contribution resulting, if the price to be paid did not  
23 exceed the "usual and normal charge," which is now defined in 11 C.F.R. § 100.52(d)(2). In

1 Advisory Opinion 1986-14 (Burton for Congress), the Commission determined that the  
2 committee could sell a campaign vehicle to a member of the general public for fair market value  
3 without the transaction resulting in a contribution from the purchaser to the committee. The  
4 Commission reasoned that the sale would be similar to an asset liquidation transaction.

5 The Commission has also considered the use of contributions for vehicle expenses in the  
6 context of Advisory Opinion 2001-03 (Meeks for Congress). In that advisory opinion, the  
7 Commission determined that the candidate's principal campaign committee could purchase a  
8 vehicle to transport the candidate and campaign staff to political and campaign events, and that  
9 use of the vehicle for 5% personal use would be considered a *de minimis* level of personal use.

10 In this matter, it is permissible for the Committee to sell the vehicle for fair market value  
11 as a liquidation of assets. See AO1986-14 (Burton for Congress). However, we cannot fully  
12 assess the circumstances of the transaction because the Massa Response provides limited  
13 information about the vehicle -- which is never identified -- and the finance agreement. The  
14 Committee paid a total of \$44,924.82 for the vehicle, including the down payment, five monthly  
15 payments, and payment to purchase the vehicle outright. Massa paid substantially less to  
16 purchase the vehicle, \$22,025.00, approximately seven months after the Committee's down  
17 payment. We do not know what "additional interest" the Committee avoided paying by  
18 purchasing the vehicle outright, see Massa Response at 2, in comparison with the \$22,899.82  
19 difference between the \$44,924.82 the Committee paid for the vehicle and the \$22,025.00 that  
20 Eric Massa paid for the vehicle. Massa avers that he paid Kelley Bluebook value for the vehicle  
21 but we cannot verify this statement because the Massa Response does not identify the vehicle.<sup>3</sup>  
22 It is unlikely that the vehicle depreciated by over fifty percent in only seven months to justify the

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<sup>3</sup> The Committee's disclosure reports also incorrectly described the payments for the vehicle as a lease rather than a purchase arrangement. See Massa Response at 2 and Beverly Massa Decl. at ¶ 3.

1 \$22,899.82 difference between the Committee's payments for the car and Massa's payment for  
2 the car. Accordingly, we recommend that the Commission find reason to believe that Massa for  
3 Congress and Beverly Massa, in her official capacity as treasurer, and Eric Massa violated  
4 2 U.S.C. § 439a(b) in connection with the \$31,896.42 payment to GMAC. A targeted  
5 investigation will be necessary to determine whether Massa paid fair market value to purchase  
6 the vehicle from the Committee.

7 **III. PROPOSED INVESTIGATION**

8 This matter will require a targeted investigation in order to obtain information about the  
9 circumstances of the \$40,000 payment to Joseph Racalto, specifically whether a deferred  
10 compensation arrangement existed. The investigation will also obtain information to determine  
11 whether Massa paid fair market value for the vehicle. We will request documentation regarding  
12 the type of vehicle and the purchase agreement. While we intend to conduct the investigation  
13 informally, in the event that it becomes necessary to utilize formal discovery, we recommend  
14 that the Commission authorize the use of compulsory process.

15 **IV. RECOMMENDATIONS**

- 16 1. Find reason to believe that Massa for Congress and Beverly Massa, in her official  
17 capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report debts and obligations  
18 in connection with the \$40,000 payment to Joseph Racalto.  
19  
20 2. Take no action at this time as to with respect to the allegation that Massa for Congress  
21 and Beverly Massa, in her official capacity as treasurer, and Eric Massa violated 2 U.S.C.  
22 § 439a(b) in connection with the \$40,000 payment to Joseph Racalto.  
23  
24 3. Find reason to believe that Massa for Congress and Beverly Massa, in her official  
25 capacity as treasurer, and Eric Massa violated 2 U.S.C. § 439a(b) in connection with the  
26 \$31,896.42 payment to GMAC.  
27  
28 4. Take no action at this time with respect to Joseph Racalto.  
29  
30 5. Authorize the use of compulsory process in this matter, including the issuance of  
31 appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.

6. Approve the attached Factual and Legal Analysis.

7. Approve the appropriate letter.

Christopher Hughey  
Acting General Counsel

9-27-10  
Date

BY: K. M. Guth  
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